

ESTTA Tracking number: **ESTTA546112**

Filing date: **07/01/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|------------------------|--|
| Proceeding | 91210750 |
| Party | Defendant Stephani A. Aguilar dba Polliwog Kids |
| Correspondence Address | BRIAN K DINICOLA DINICOLA & YOUNG PC 475 WALL STREET PRINCETON, NJ 08540 UNITED STATES bdinicola@youngipt.com |
| Submission | Motion to Amend/Amended Answer or Counterclaim |
| Filer's Name | Brian K. Dinicola |
| Filer's e-mail | bdinicola@youngipt.com |
| Signature | /Brian K. Dinicola/ |
| Date | 07/01/2013 |
| Attachments | POLLIWOG KIDS AMENDED ANSWER.pdf(44286 bytes) |

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application Serial No. 85/806,650
Published in the *Official Gazette* May 14, 2013

| | | |
|--|---|---------------------------------|
| Polliwogs, LLC |) | |
| d/b/a Polliwogs Children's Boutique |) | |
| Opposer, |) | |
| |) | |
| v. |) | Opposition No.: 91210750 |
| |) | |
| Stephani Aguilar |) | |
| d/b/a Polliwog Kids, |) | Mark: POLLIWOG KIDS |
| |) | |
| Applicant. |) | |

AMENDED ANSWER TO NOTICE OF OPPOSITION
AND AFFIRMATIVE DEFENSES PURSUANT TO
F.R.C.P. 15(a)

Pursuant to Sec. 15(a) of the Federal Rules of Civil Procedure, Stephani Aguilar ("Applicant"), submits this Amended Answer and Affirmative Defenses as a substitute for the prior Answer filed on June 25, 2013. The Amended Answer is submitted within 21 days after service of the prior pleading. The Opposer has not responded to the prior pleading, and no response to such prior pleading is required or expected, in any event, under the rules of the TTAB.

Applicant, for her answer to the Notice of Opposition filed by Polliwogs, LLC ("Opposer") against application for registration of Applicant's trademark POLLIWOG KIDS, Serial No. 85-806,650 filed December 19, 2012, and published in the Official Gazette of May 14, 2012 (the "Mark"), pleads and avers as follows:

1. Answering paragraph 1 of the Notice of Opposition, Applicant admits the

allegations thereof.

2. Answering paragraph 2 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations thereof.

3. Answering paragraph 3 of the Notice of Opposition, Applicant admits that Opposer is the owner of U.S. Trademark Application Serial No. 85-881,741 but denies that Opposer has used the mark POLLIWOGS in connection with any services prior to December 19, 2012, and Applicant does not have sufficient knowledge or information to form a belief as to the remaining allegations contained therein and accordingly denies the remaining allegations thereof.

4. Answering paragraph 4 of the Notice of Opposition, Applicant admits that Opposer is the owner of U.S. Trademark Application Serial No. 85-881,745, but does not have sufficient knowledge or information to form a belief as to the remaining allegations contained therein and accordingly denies the remaining allegations thereof.

5. Answering paragraph 5 of the Notice of Opposition, Applicant denies the allegations thereof.

6. Answering paragraph 6 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

7. Answering paragraph 7 of the Notice of Opposition, Applicant denies the allegations thereof.

AFFIRMATIVE DEFENSES

First Affirmative Defense

8. Applicant affirmatively alleges that Opposer fails to state a claim upon which legal relief can be granted.

Second Affirmative Defense

9. Applicant affirmatively alleges that Applicant, and not Opposer, has superior rights in the POLLIWOG formative of the Mark.

Third Affirmative Defense

10. Applicant affirmatively alleges, upon information and belief, that Opposer's pleaded use of the alleged POLLIWOGS mark constitutes a fraudulent trading on the reputation of others, and therefore Opposer cannot be damaged by registration of the Mark to Applicant.

Fourth Affirmative Defense

11. Applicant further affirmatively alleges, upon information and belief, that Opposer has unclean hands by virtue of having misrepresented Opposer's date of first use of POLLIWOGS, as a trademark or service mark in a willful and deliberate attempt to establish itself as a senior party in this Opposition, despite Opposer's knowledge of the falsity of such claims with respect to both its own use as operator of the store Polliwog Children's Boutique and the use by the prior owner(s) of such store.

12. Applicant further affirmatively alleges that upon information and belief, Opposer has falsely and fraudulently represented -- through trademark registration filings in both the State of North Carolina and in Ser. No. 85-881741 pending before the U.S.

Patent and Trademark Office -- that it has been applying the alleged mark “POLLIWOGS” in connection with “retail store services” since the year 2005, and that such mark has been used in interstate commerce since 2005.

13. Applicant further affirmatively alleges that upon information and belief, Ms. Melissa Martin opened the Polliwogs Children’s Boutique in 2005, operating it as a sole proprietorship at a single store location situated at 3000 Lawndale Drive, in the Delwoods Park neighborhood of Greensboro, NC (the “Store”). The Store is located approximately 8 miles from the nearest interstate highway (I-40) and approximately 40 miles from the nearest interstate border (with the State of Virginia).

14. Applicant further affirmatively alleges that upon information and belief, Ms. Martin retired on or about May, 2012. Upon information and belief, Ms. Martin neither operated nor maintained a website, as for the purpose of advertising the pleaded retail services (i.e., in connection with the sale of children’s clothing and/or toys), for the entire term of her ownership of the Store. Applicant further affirmatively alleges that upon information and belief, Ms. Martin never distributed a product catalog so as to market the pleaded retail services to potential interstate purchasers during the time she owned and operated the Store.

15. Applicant further affirmatively alleges that upon information and belief, Ms. Martin never used the formative POLLIWOG or POLLIWOGS, as a cognizable service mark, in any intrastate or interstate advertising. As such, there was no opportunity to create, in the minds of consumers of the pleaded services, any association between the term POLLIWOGS and the pleaded services.

16. Applicant further affirmatively alleges that, upon information and belief, the

aforementioned lack of prior interstate and interstate use of the formative POLLIWOGS as a service mark on the part of Ms. Martin was known to the Opposer prior to filing Trademark Application Ser. No. 85-881741, and that the false representations to the contrary made therein, as well as in the subject Opposition, were made willfully and with the intention and singular purpose of deceiving the U.S. Patent and Trademark Office and the Board.

17. Applicant further affirmatively alleges that, upon information and belief, the Opposer acquired the Store from Ms. Martin on or about June of 2012, and that the Opposer continued to operate the Store, and advertise its services, in substantially the same manner as prior to the acquisition. Specifically, upon information and belief, at no time prior to Applicant's filing of an application to register the Mark did Opposer ever use POLLIWOG or POLLIWOGS as a distinctly cognizable mark, whether in interstate or in intrastate commerce. As a result of this continued lack of local or interstate advertising, there was no opportunity for intrastate or interstate purchasers to develop any association between the alleged mark POLLIWOGS and the pleaded services of Opposer.

Fifth Affirmative Defense

18. Applicant further affirmatively alleges that there is no likelihood of confusion, mistake or deception because, *inter alia*, the Mark and the alleged trademarks of Opposer are not confusingly similar; there are, upon information and belief, other *intrastate* users of third party marks with the "Polliwog" or "Polliwogs" formative in the same channels of trade; Applicant did not intend any association with any of Opposer's alleged trademarks; and upon information and belief, ordinary prospective purchaser's of Applicant's products will not associate Applicant's Mark with the Opposer's pleaded marks.

Sixth Affirmative Defense

19. Applicant further affirmatively alleges that under the anti-dissection rule, any secondary meaning Opposer may have in its alleged trademarks -- by virtue of having used “Polliwogs Children’s Boutique” as the identification, upon information and belief, of a single store location in central North Carolina prior to Applicant’s date of filing to register the Mark – is to be narrowly circumscribed to the exact trademark it alleges to have been using in commerce prior to December 19, 2012. Any secondary meaning, therefore, can not and does not extend to the formative “Polliwog” (or “Polliwogs”), by itself, but must be viewed in its entirety against Applicant’s Mark in its entirety.

WHEREFORE, Applicant prays as follows:

- (a) this opposition be dismissed; and
- (b) a registration for the mark POLLIWOG KIDS be issued to the Applicant.

Respectfully submitted this 1st day of July, 2013.

DINICOLA & YOUNG, PC
Attorneys for Applicant

/s/ Brian K. Dinicola
Brian K. Dinicola

NJ State Bar No. 8411994
475 Wall St.
Princeton, NJ 08540
Telephone: (609) 642-4579
Facsimile: (609) 683-9633
Email: bdinicola@youngipt.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of July, 2013, a true copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES was served in the following manner:

VIA FIRST CLASS MAIL

Frank M. Caprio
Angela Holt
BRADLEY ARANT BOULT
CUMMINGS LLP
200 Clinton Avenue, Suite 900
Huntsville, AL 35801

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 1st day of July 2013.

By: /s/ Brian K. Dinicola
Brian K. Dinicola

Dinicola & Young, PC
475 Wall St
Princeton NJ 08540
(609) 642-4579

Attorneys for Applicant